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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 602

ROBERT E. GOLLAHER AND GOLLAHER CONSTRUCTION, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1969; on the same date, a petition for rehearing and/or rehearing in banc was denied (Pet. App. 23). On September 17, 1969 the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the individual petitioner was improperly called as a witness before the grand jury or otherwise denied any of his constitutional rights by virtue of his appearance before that body.

2. Whether, under the circumstances of this case, in which the individual petitioner denied his guilt during trial and at the time of sentencing, the comments of the trial court and the sentence to a term of imprisonment indicated an intent on the part of the trial court to punish petitioner for persisting in his claim of innocence.

3. Whether petitioners were subjected to double punishment because in addition to their criminal convictions, they were denied federally insured loans for their building business.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of California, petitioner Gollaher and his corporation, Gollaher Construction, Inc., were convicted on six counts (13 R. 1436) [1] of a fifteen count indictment. The indictment charged that they conspired with co-defendant, Evelyn Barbee,[2] an employee, and others, to make false statements to the Federal Housing Administration and the Veterans Administration in connection

[1] "R." preceded by the volume number, refers to the fourteen volume court of appeals record on file with the Clerk of this Court. The last thirteen volumes, containing the transcript of trial and post-trial matters, are consecutively paginated.

[2] Before petitioners' trial commenced, Mrs. Barbee pleaded guilty to Count 2 and testified as a government witness at trial.

with mortgage loan guarantees (Count 1), that they caused false documents to be filed in connection with both the F.H.A. and V.A. insured loan applications of one McDaniels (Counts 2, 5, and 6), and that they caused two false documents to be filed in connection with the V.A. insured loan application of one Holt (Counts 3 and 4), in violation of 18 U.S.C. 371, 1010, and 1001.[3] On December 12, 1966, petitioner Gollaher was sentenced to two years' imprisonment on each count, to be served concurrently, and fined a total of $30,000, with one year of the prison sentence to be suspended if the fine was paid within one year. The corporate petitioner was sentenced to a fine of $6,000 (1 R. 244, 14 R. 1487).

1. The evidence showed that in 1962–1963, petitioner Gollaher, operating through various companies he had formed, including corporate petitioner Gollaher Construction, Inc., was a builder of tract homes in the Fresno, California area. These homes were usually purchased from him by means of F.H.A. or V.A. insured mortgages (10 R. 989). Before guaranteeing repayment in the event of default to the mortgage loan companies, the governmental agencies required that the buyer meet certain eligibility and credit criteria, and further required that he intended to occupy the house as his home (2 R. 26–30, 95–96).

The customary procedure was for the mortgage loan companies to furnish petitioner's corporation with "loan packages" which contained all the papers neces-

[3] The jury did not return a verdict on Counts 7–15, which also involved allegedly false statements designed to obtain governmental mortgage loan guarantees (13 R. 1436).

sary for a potential purchaser to apply for a government-guaranteed home loan. After finding a prospective buyer, petitioner's corporation would have him fill out the necessary papers and sign the loan guarantee application in blank. The "loan package" would then be returned to the mortgage lending company, which would transpose the information on the various documents and worksheets onto the loan application and submit the application to the F.H.A. or the V.A. Upon issuance by the government agency of a "firm" loan guarantee the mortgage company issued its check (3 R. 115–117). The effect of the issuance of a home mortgage check was to pay off the builder's construction loan, and to give the builder, petitioner's corporate entity, its profit (3 R. 221, 11 R. 1117).

Early in 1962, petitioner encountered difficulty in finding buyers whose mortgages would qualify for F.H.A. or V.A. loan guarantees. When a prospective buyer would have difficulty qualifying for a government insured loan, petitioner's organization then began a practice of substituting names on the loan applications (Count 1) (3 R. 220). For example, after discussing the matter with petitioner (3 R. 220), coindictee Mrs. Barbee, a "loan processor" who worked for petitioner's organization, would locate a qualified military veteran—*i.e.* one whose credit was good and who had not used his V.A. loan guarantee to buy a home. The veteran would then be induced to "sell" his right to a V.A. loan guarantee for $300. Under the terms of the arrangement the veteran would furnish the information required by the "loan package" and would sign in blank the application for the mortgage loan (3 R.

217–222). In that way, a government guaranteed mortgage could be obtained in the veteran's name, with the unqualified prospective buyer occupying the house and making the monthly payments in the name of the veteran (3 R. 206, 5 R. 562, 7 R. 732).

Petitioner also engaged in substitution of names of applicants for F.H.A. mortgages. One of the names used by petitioner for this purpose was that of Lloyd McDaniel, petitioner's brother-in-law and an employee of corporate petitioner. (7 R. 701.)

2. At trial petitioner testified that he knew nothing of the practice of his employees in purchasing, by checks made to cash, loan entitlements from veterans (10 R. 1005, 11 R. 1068, 1071). According to petitioner, he travelled frequently and in order to keep his Fresno operation running smoothly he had left many presigned blank checks with his brother-in-law, McDaniel, which were to be used to pay the bills of petitioner's corporations. (10 R. 991, 1005, 1009).

On cross-examination petitioner was asked if the other companies through which he operated were subsidiaries of Gollaher Construction, Inc. He said they were not. The government attorney pointed out that this was contrary to testimony which petitioner had given to the grand jury which had investigated the mortgage loan irregularities. Petitioner explained the difference in his testimony as due to his misunderstanding of the meaning of the term subsidiary. (11 R. 1081–1085). Also, on cross-examination, petitioner was asked if he had not told the grand jury that all checks were made out before he signed them, in contradiction to his court testimony that he had left pre-

signed checks with McDaniel. Petitioner replied that he had not signed the grand jury minutes, that if he had said that, it was due to a misunderstanding on his part, and that he knew he had left presigned checks with McDaniel (11 R. 1135–1137).

The only objection to the cross-examination regarding the grand jury testimony was to the question whether one corporation was a subsidiary of another, which defense counsel objected to on the ground that the question called for a legal conclusion. The trial court permitted petitioner to answer so that the jury "would understand the arrangement between the numerous corporations" with which petitioner was associated (11 R. 1083). The court in its final instructions admonished the jury that if it found any discrepancies arising on cross-examination by virtue of petitioner's grand jury testimony, these were to be considered only on the issue of credibility (13 R. 1414–1415).

ARGUMENT

1. Petitioner contends (Pet. 6–18) that his grand jury testimony, which was used only for impeachment, was improperly admitted at trial on the ground that he had not been given his full *Miranda* warnings[4] prior to his testimony before that body, particularly his right to confer with counsel (Pet. 12).

The fact is when petitioner appeared before the grand jury he was not a defendant. On the contrary, at the time he was called the grand jury was still seeking

[4] *Miranda* v. *Arizona*, 384 U.S. 436.

information in support of its investigation. In such circumstances, petitioner was properly subject to inquiry, and not, as he contends (Pet. 15–18), entitled to immunity from prosecution for such testimony. See, *e.g.*, *United States* v. *Scully,* 225 F. 2d 113, 114 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Cleary,* 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United States* v. *Winter,* 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Fortunato,* 402 F. 2d 79 (C.A. 2), certiorari denied, 394 U.S. 933; *United States* v. *Capaldo,* 402 F. 2d 821 (C.A. 2), certiorari denied, 394 U.S. 989; *United States* v. *Strang,* 405 F. 2d 971 (C.A. 6) certiorari denied, 395 U.S. 906.

Petitioner was advised of his Fifth Amendment right to silence prior to his grand jury appearance (Pet. App. 5–6, 1 R. 73, 93). Under long established policy, he was not, in addition, entitled to consult with counsel during the course of the interrogation. See Rule 6(d), F.R. Crim. P.; see also, *In re Groban,* 352 U.S. 330, 333; *United States* v. *Capaldo,* 402 F. 2d 821, 824 (C.A. 2), certiorari denied, 394 U.S. 989. The validity of this policy rests upon the proposition that for the grand jury to serve its unique investigatory function, it must operate with unfettered inquisitorial power. Its purpose is not to determine questions of guilt or innocence; nor, as petitioner contends, are its operations comparable to the custodial interrogation of an accused by government agents. Compare *Mi-*

randa v. *Arizona*, 384 U.S. 436;[5] see also, *United States* v. *Wade*, 388 U.S. 218. The function of the grand jury is to determine whether formal criminal charges should be lodged and against whom, a function which would be severely impaired by transforming it into an adversary proceeding. See, *e.g.*, *United States* v. *Scully*, 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Strang*, 405 F. 2d 971 (C.A. 6), certiorari denied, 395 U.S. 906.

Furthermore under the trial court's instructions (13 R. 1414–1415, 1435), to which defense counsel did not object, the grand jury testimony was used only for impeachment and could only have had relevance on the count charging a conspiracy (Count 1) (see 10 R. 1005, 1008, 1018–1022, 7 R. 710, 2 R. 217, 5 R. 480, 13 R. 1414–1415).[6] Finally, as the court of appeals held, no timely objection was raised at trial regarding this issue; accordingly, it was not properly preserved for appeal (Pet. App. 5). *United States* v. *Indiviglio*, 352 F. 2d 276, 279–280 (C.A. 2), certiorari denied, 383 U.S. 907; *United States* v. *Armetta*, 378 F. 2d 658, 660–661 (C.A. 2).

2. At the time of sentencing, petitioner's counsel asked for probation and a fine, rather than imprison-

[5] Petitioner relies on *Mattox* v. *Carson*, 295 F. Supp. 1054 (M.D. Fla.) as requiring a full *Miranda* warning to potential grand jury witnesses (Pet. 9–11). That case is distinguishable. There the defendants in a state proceeding, without benefit of counsel, waived the immunity to which they were entitled under specific state statute (see 295 F. Supp. at 1056). They thus insured their indictment by their execution of the waiver and their grand jury testimony. No such statutory scheme, and no waiver of immunity, was involved here.

[6] Petitioner received concurrent sentences on each count.

ment, for petitioner. After listening to a portion of the clemency plea, the trial court inquired if probation did not require trust in petitioner; the court then stated that it was unable to find such a trust because of petitioner's untruthfulness during trial and lack of acknowledgement of guilt afterwards (14 R. 1478–1479; see Pet. 18–19). Co-defense counsel, as part of his reply, stated, in essence, that to make a not guilty plea a basis for increased punishment would be totally unfair, and that a defendant who considers himself innocent and takes that position, on appeal should not, because of such persistence, have his sentence increased (14 R. 1483–1484). The court answered:

> "That wasn't it at all. Counsel was talking about rehabilitation and I just mentioned that the first step * * *, you first have to admit you are wrong and need to be rehabilitated. Mr. Gollaher hasn't reached the first step, that was my only comment. [14 R. 1484.]

The court later stated: that he had only spoken in regard to probation (14 R. 1485), adding that,

> "* * * My only contact with Mr. Gollaher has been in this courtroom and the only contact I had with him he lied under oath, so I can't trust him. Maybe he can be trusted by someone else that he's done business with, but I can't. That's the question of probation. I have to have some trust in the people we put on probation or it's a useless act." [14 R. 1485–1486.]

The court then sentenced petitioner to a maximum of two year's imprisonment, with one year suspended if an imposed fine were promptly paid (14 R. 1487).[7]

The record thus shows that in sentencing petitioner to imprisonment for no more than two years, out of a possible maximum of twenty-seven years,[8] the trial court was not sentencing petitioner because of his plea or his continued assertion of innocence. Cf. *North Carolina* v. *Pearce*, 395 U.S. 711, 724. The trial judge, in making his comments, focused upon what he believed the evidence showed—*i.e.*, that petitioner lied at trial; the court also noted that in not admitting he was wrong at the sentencing procedure petitioner had not taken the "first step" towards rehabilitation. These were perfectly legitimate considerations for the trial court to take into account in fixing an appropriate sentence.

Moreover, the court's consideration of petitioner's failure to admit his guilt went only to the question of probation, which is a privilege to be granted at the discretion of the sentencing judge, and which cannot be demanded as a matter of right. *Burns* v. *United States*, 287 U.S. 216, 220; cf. *Frank* v. *United States*, 395 U.S. 147. *Thomas* v. *United States*, 368 F. 2d 941

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[7] Petitioner's co-indictee, Mrs. Barbee, was a salaried employee who never received more than $110 a week (3 R. 255). She received no bonuses, gifts or other compensation for her work in connection with the false statements filed on behalf of petitioner's organization (3 R. 255–256, 11 R. 1104–1105). Mrs. Barbee, who pleaded guilty (2 R. 200), and testified for the government, received a suspended sentence (Pet. App. 1).

[8] Count 2, which alleged a violation of 18 U.S.C. 1010 carried a two year maximum; each of the other Counts, under 18 U.S.C. 371 or 1001 subjected petitioner to a possible five-year sentence.

(C.A. 5), on which petitioner relies (Pet. 20), is distinguishable because there the court, after noting that a not guilty plea might have resulted in a lighter sentence, sentenced the defendant to the twenty-five year maximum (see Pet. App. 20–21). Similarly distinguishable in *Scott* v. *United States,* No. 20,954 (C.A. D.C.) decided February 13, 1969. Here, the court could well conclude that petitioner had lied, and was not worthy of probation. The record is replete with instances in which petitioner sought to conceal his wrongdoing, and to discourage prosecution witnesses from testifying (*e.g.,* 4 R. 243–246, 6 R. 457, 7 R. 664, 671–673, 717, 865). There was no abuse of discretion in denying probation in these circumstances.

As the court of appeals pointed out justice is better served in a situation such as this "by a forthright disclosure of the state of mind of the judge" (Pet. App. 22). Thus, had the judge said nothing, petitioner would be in no position to challenge the sentence, which was far below the statutory maximum. Nor is this a case where an admission of guilt at sentencing was used by the government in an argument in the court of appeals to affirm the conviction, cf. *Simmons* v. *United States,* 390 U.S. 377, 389–394, because petitioner never made such an admission.

3. The claim (Pet. 23–29) that the refusal of the F.H.A. and V.A. to continue to insure mortgages on homes built by petitioner constituted "punishment" for his illegal conduct and precluded his criminal prosecution for the same conduct is not valid. As the court below pointed out, the authority "given the Veterans Administration * * * [with regard to the

insurance of home loans] was designed to protect the interest of veterans and the government where the methods of practices pursued in relation to the marketing of such properties are unfair or unduly prejudicial to purchasers. It was not designed to punish the builder" (Pet. App. 7). There was thus no bar to petitioners' criminal prosecution. See *Helvering* v. *Mitchell*, 303 U.S. 391, 399.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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